CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 56/13
[2013] ZACC 38

In the matter between:

PATRICK LORENZ MARTIN GAERTNER	First Applicant
RORY CHARLES KLEMP	Second Applicant
ORION COLD STORAGE (PTY) LTD	Third Applicant
and	
MINISTER OF FINANCE	First Respondent
COMMISSIONER: SOUTH AFRICAN REVENUE SERVICE	Second Respondent
CONTROLLER OF CUSTOMS: CAPE TOWN	Third Respondent

Heard on : 12 September 2013

Decided on : 14 November 2013

JUDGMENT

MADLANGA J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] "*Kubomvu*!"[1] is the warning that a lookout would sound on the arrival of police at one or the other of the homes that had the misfortune of being subjected to frequent, warrantless police searches. To the apartheid state the oppressed majority had no privacy to be protected; and no dignity to be respected. Of course, the warning could only be sounded on some of those occasions when the police descended for the searches during the day. Most certainly for effect and possibly heightened indignity, many of the egregious searches were conducted at the dead of night: a time of relaxation; sleep; intimacy; reckless abandon even; and when some, if not most, would be flimsily dressed. The sense of violation and degradation that the victims must have experienced is manifest. Even members of the then dominant race who were viewed as enemies of the state suffered this indignity. It is with this painful history in mind that we consider the constitutional validity of statutory provisions that authorise searches without warrants. In this case, we do it in the context of the customs and excise industry.[2]

[2] The Western Cape High Court, Cape Town (High Court) held that sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6)[3] of the Customs and Excise Act[4] are

[1] Literally, "It's red!" in the Nguni languages.

[2] It must be remembered that the impugned provisions of the Customs and Excise Act 91 of 1964, at the heart of this dispute, date back to 1 January 1965 (this being the date of commencement of the Act) – a time when wide powers were "conferred upon the police to enter homes without a search warrant at all times to enforce the law of apartheid and to maintain the security of the state . . . the Criminal Procedure Act [56 of 1955] was amended to permit *any* policeman to enter *any* premises at *any* time without a warrant". (Emphasis in original.) (Dugard *Human Rights and the South African Legal Order* (Princeton University Press, Princeton 1978) 144-5).

[3] The text of section 4, inclusive of the High Court's reading-in, is quoted in [19] below.

[4] 91 of 1964.

inconsistent with the Constitution and declared them invalid.[5] This declaration was ordered not to be retrospective and suspended for a period of 18 months to afford the Legislature an opportunity to make remedial changes. In order not to create a lacuna in the legislative scheme and purpose served by the affected provisions, the High Court read in certain provisions.

[3] The applicants now seek confirmation of the High Court's declaration of invalidity.

Parties

[4] Mr Gaertner and Mr Klemp, the first and second applicants, are directors of the third applicant, Orion Cold Storage (Pty) Ltd (OCS), which conducts business as an importer and distributor of bulk frozen foods.

[5] The first respondent is the Minister of Finance (Minister). He is the minister responsible for the Customs and Excise Act. The second respondent is the Commissioner of the South African Revenue Service (SARS). The Commissioner administers the Customs and Excise Act. The third respondent is the Controller of Customs: Cape Town.[6]

[5] *Gaertner and Others v Minister of Finance and Others* 2013 (4) SA 87 (WCC) (High Court judgment).

[6] I will refer to the second and third respondents collectively as the "SARS respondents".

Background facts

[6] OCS imports and distributes bulk frozen foodstuffs and holds licences for storage warehouses (also known as customs bonded warehouses or bond stores) in Muizenberg. SARS officials perform routine inspections of OCS's storage warehouses, at most annually, to monitor compliance with the Customs and Excise Act. Past inspections have always been limited to OCS's bond stores and have never extended to OCS's offices or to the homes of OCS's employees or officers.

[7] On 21 May 2012 Sloan Valley Dairies Ltd (SVD) of Canada instituted motion proceedings against OCS claiming the return of consignments of skim milk powder sold to OCS, alternatively payment of the purchase price. SVD served a copy of the application on SARS. SARS compared the invoices attached to the application with those that OCS had submitted to SARS for purposes of customs duty. The prices on the SVD invoices were substantially higher than what was reflected on the submission to SARS. This discrepancy led SARS to suspect that OCS had fraudulently manipulated the invoices so as to pay less duty. Consequently, SARS decided to search the premises of OCS.

[8] On 30 and 31 May 2012, SARS officials numbering about 40 searched OCS's Muizenberg premises.[7] When they arrived on the first day, they gave Mr Gaertner to understand that they were there to conduct a bond inspection[8] and he allowed them in.

[7] In the interests of brevity, I have lumped the events of the two days together, except where I find it necessary to specify those of a particular day.

[8] This is an inspection of the warehouse which forms part of the premises.

It was only after they had sealed the premises that they told Mr Gaertner the true reason for their presence. At that point Mr Gaertner asked for time to get his attorney to the premises. The attorney not having arrived after 30 minutes, an extensive search ensued. Over the two-day period it included a search of the warehouse; bond store; a safe in the strong room; computers; and the offices of Mr Gaertner and Mr Klemp. Mirror images of data on various computers were made and a variety of documents and other objects were seized.

[9] As the search was in progress, entry into and exit from the premises was controlled by the SARS officials. People were only allowed out if they agreed to thorough body and vehicle searches. OCS staff were required to stand clear of their computers. Early on during the search an official had warned, if not threatened, Mr Gaertner that obstructing a search was an offence and, if necessary, they would call the police for assistance.

[10] Through it all, the officials did not have a search warrant. In fact, they told Mr Gaertner that they did not need one for a search in terms of section 4 of the Customs and Excise Act.

[11] At around 11h00 on 1 June 2012, 14 SARS officials proceeded to Mr Gaertner's Constantia home to continue the warrantless search there. Mr Gaertner's employee denied them entry until Mr Gaertner arrived. They refused to give Mr Gaertner reasons for the search and would not tell him what they were

looking for. The officials searched the whole house, including freezers, the ceiling space, the safe, the cellar, garages and storerooms. In the process they went through personal belongings and demanded and got access to the home computers, including those of Mr Gaertner's children. During the search, the officials took photographs.

[12] On 2 July 2012 the applicants brought an application before the High Court citing, as respondents, the Minister, the other respondents before this Court and several SARS officials. They sought declarators that the searches and seizures were unlawful and that section 4 of the Customs and Excise Act is inconsistent with the Constitution and invalid to the extent that it permits targeted, non-routine enforcement searches[9] to be conducted without a warrant. They further sought the return of what was seized during the searches. After some initial half-hearted tenders, SARS finally tendered the return of all seized goods and the applicants' costs on an attorney and client scale. Despite the actual return of some of the items and the tender of the return of the rest, SARS could not convince the applicants to abandon the application.

[13] In their answering affidavits the Minister and SARS took the stance that the question whether section 4 was inconsistent with the Constitution and the lawfulness of the searches were moot as a tender for the return of the seized goods had been made, and the applicants had accepted it. They contested the claim that section 4 of the Customs and Excise Act is unconstitutional and contended, instead, that to the extent that the section limited the right to privacy, this was justified under section 36

[9] These terms will be defined later.

of the Constitution. In the alternative, they pleaded that a declaration that section 4 was unconstitutional should not be retrospective and that it should be suspended to afford the Legislature an opportunity to correct the defect. SARS also denied that the searches had been conducted in an unlawful manner.

High Court

[14] The High Court accepted the submission that the question whether the searches had been conducted in an unlawful manner had become moot. In argument, SARS conceded the unconstitutionality of section 4. The contest between the parties boiled down to: the reasons for and thus the extent of the invalidity; whether the declaration of invalidity should be suspended and rendered non-retrospective; and whether in the meanwhile words should be read into the impugned provisions to make them constitutionally acceptable.[10]

[15] The High Court felt it necessary to determine all the issues raised by the parties and go beyond merely making a finding of constitutional invalidity on the most obvious ground. This, it reasoned, was because an amended provision might face another challenge on grounds left undecided in the first case. Put differently, the Legislature might be left in the dark as to the exact nature of what was objectionable.

[16] The High Court concluded that—

[10] High Court judgment above n 5 at para 14.

> "[w]arrantless routine searches are justifiable under the Act in respect of the business premises of persons registered in terms of section 59A, of persons licensed under Chapter VIII, of persons registered under section 75(10) and of persons who operate pre-entry facilities, to the extent that the search relates to the business for which such person is registered or to the business for which such premises are licensed or registered, or to the business of operating the pre-entry facility."[11]

[17] The High Court held that warrantless non-routine or targeted searches are justifiable in respect of pre-entry facilities, licensed warehouses and rebate stores,[12] to the extent that the searches relate to the business of operating the pre-entry facility or to the business of the licensed warehouse or rebate store. Searches without judicial warrant are not justifiable in other cases, the High Court concluded. In particular, there is no justification for dispensing with the requirement of a warrant in the case of searches of the premises of unregistered and unlicensed persons and non-routine searches of the premises of registered persons except to the extent that the search relates to the business of operating the pre-entry facility or to the business of the licensed warehouse or rebate store.

[18] In those cases requiring a warrant, the High Court held that it would not be necessary to require SARS officials to apply for one under the Criminal Procedure

[11] High Court judgment above n 5 at para 103. The High Court defined a non-routine search as "being a search where the premises are selected (targeted) for search because of a suspicion or belief that material will be found there, showing or helping to show that there has been a contravention of the Act. The purpose of the search will be to find material relating specifically to the suspected contravention. A routine search is any search other than a targeted search." Pre-entry facilities are facilities where goods are kept prior to their entry into the country and can be described as: a transit shed as referred to in section 6(1)(g); a container terminal as referred to in section 6(1)(hA); a container depot as referred to in section 6(1)(hB); or a state warehouse as referred to in section 17.

[12] The High Court judgment termed these "designated premises".

Act[13] or National Prosecuting Authority Act.[14] It took the view that the Customs and Excise Act could be amended to contain provisions entitling SARS officials to apply for warrants to a judicial officer.

[19] The High Court then made the declaration of invalidity, suspended it and read in as shown below. The High Court's reading-in was quite extensive. For clarity, let me quote the relevant part of section 4, inclusive of the High Court's reading-in. The part that was read in is underlined:

> "**General duties and powers of officers**
>
> (4) (a) An officer may, for purposes of this Act—
>
> (i) enter premises and make such examination and enquiry as he deems necessary, <u>subject to the provisions of paragraphs (c) – (h) of this subsection</u>;
>
> (ii) while he is on the premises or at any other time require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by this Act is required to be kept or exhibited or which relates to or which he has reasonable cause to suspect of relating to matters dealt with in this Act and which is or has been on the premises or in the possession or custody or under the control of any such person or his employee;
>
> (iii) at any time and at any place require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in this Act, the production thereof then and there, or at a time and place fixed by the officer; and
>
> (iv) examine and make extracts from and copies of any such book or document and may require from any person an

[13] 51 of 1977.

[14] 32 of 1998.

explanation of any entry therein and may attach any such book, document or thing as in his opinion may afford evidence of any matter dealt with in this Act.

(b) An officer may take with him on to any premises an assistant or a member of the police force, provided that only those assistants and members of the police force whose presence, in the officer's reasonable opinion, is strictly necessary for purposes of conducting the inspection, search or examination on the premises may enter the premises.

(c) The power of entry in terms of sub-paragraph (i) of paragraph (a) of this subsection shall be subject to the further provisions of paragraphs (d) to (g), in regard to which the definitions in paragraph (h) shall apply.

(d) Subject to paragraph (e), if an officer wishes to enter premises to conduct a non-routine search, the officer shall not do so except on the authority of a warrant issued in terms of paragraph (g) of this subsection; provided that this paragraph shall not apply to the non-routine search of designated premises to the extent that the search pertains to the business of operating the designated premises or to the business in respect of which the designated premises have been licensed or registered.

(e) An officer may enter and search premises without the warrant contemplated in paragraph (d) if:

(i) the person in charge of the premises consents to the entry and search after being informed that he is not obliged to admit the officer in the absence of a warrant; or

(ii) the officer on reasonable grounds believes—

(aa) that a warrant would be issued in terms of paragraph (g) if the officer applied for a warrant;

(bb) that the delay in obtaining the warrant is likely to defeat the object of the search.

(f) If the officer wishes to enter premises in circumstances where a warrant is not required in terms of this subsection, he shall comply with the following requirements:

(i) The officer may enter the premises only during ordinary business hours unless in his reasonable opinion he considers

that entry at any other time is necessary for purposes of the Act.

(ii) The officer shall, upon seeking admission to the premises, inform the person in charge of the premises whether the purpose of entry is to conduct a routine inspection or to conduct a non-routine search.

(iii) If the purpose of entry is to conduct a non-routine search, the officer shall hand to the person in charge a written statement signed by him stating the purpose of the search; provided that if, in the officer's reasonable opinion, there are circumstances of urgency which may result in the purpose of the search being frustrated if its commencement is delayed until such a statement can be prepared, the officer shall orally inform the person in charge of the purpose of the search; provided further that the search shall be confined to such searching, inspection and examination as are reasonably necessary for the stated purpose; and provided further that if in the officer's reasonable opinion there are grounds for believing that the object of the search may be frustrated if the person in charge is informed of the purpose of the search, the officer may, before complying with this sub-paragraph (iii), take such steps as he considers necessary to prevent persons present on the premises from concealing, destroying or tampering with any document, data or thing located at the premises.

(iv) The person in charge shall have the right to be present, or to appoint a delegate to be present, during and to observe the search.

(v) If the officer removes anything from the premises pursuant to the search, he shall compile an inventory of such items and shall, prior to leaving the premises, sign the inventory and hand a copy thereof to the person in charge.

(vi) If the officer makes any copies or extracts during the course of the search, he shall compile a schedule of such material and shall, prior to leaving the premises, sign and hand a copy thereof to the person in charge.

(vii) The officer must conduct the search with strict regard for decency and order.

(g) An officer may apply to a magistrate or judge in chambers for the issue of a warrant contemplated in paragraph (d) of this subsection, and the magistrate or judge may issue such warrant if it appears from information on oath:

(i) that there are reasonable grounds for suspecting that a contravention of the Act has occurred; and

(ii) that a search of the premises is likely to yield information pertaining to such contravention; and

(iii) that the search is reasonably necessary for the purposes of the Act.

(h) For purposes of this subsection the following expressions have the meaning indicated:

(i) 'designated premises' means any transit shed or container terminal as contemplated in section 6(1) of the Act, any premises in respect of which a license has been issued in terms of Chapter VIII of the Act, and any rebate store as contemplated in rule 75.08 of the rules promulgated in terms of section 120;

(ii) 'non-routine search' means a search which an officer has decided to conduct because a suspicion exists that a contravention of the Act has occurred and because the officer suspects that information pertaining to such contravention may be discovered if the premises in question are searched;

(iii) 'routine search' means any search, inspection or examination other than a non-routine search.

(5) Any person in connection with whose business any premises are occupied or used, and any person employed by him shall at any time furnish such facilities as may be required by the officer for entering the premises and for the exercise of his powers under this section.

(6) (a) If an officer, after having declared his official capacity and his purpose and having demanded admission into any premises and having complied with any applicable requirements of subsection (4), is not immediately admitted, he and any person assisting him may at any time, but at night only on the presence of a member of the police

> force, break open any door or window or break through any wall on the premises for the purpose of entry and search;
>
> (b) An officer or any person assisting him may at any time break up any ground or flooring on any premises for the purpose of search if the officer in his reasonable opinion considers such breaking up to be necessary for the purposes of the Act; and if any room, place, safe, chest, box or package is locked and the keys thereof are not produced on demand, the officer may open such room, place, safe, chest, box or package in any manner."

In this Court

[20] In addition to seeking confirmation of the declaration of invalidity, the applicants support the interim reading-in made by the High Court, subject to the deletion of the part which permits warrantless targeted searches of designated premises.[15]

[21] On invalidity, the applicants argue that section 4 is overbroad for the following reasons. First, it permits entry into and searches of virtually any premises that have some connection with persons being inspected or investigated.

[22] Second, overbroad as the section is regarding premises, the official invoking it does not have to hold a belief or apprehension – let alone a reasonable one – of a contravention of the Customs and Excise Act to justify the search. And this is so whether the search is targeted or not.

[15] Section 4(4)(d) of the Act as read in by the High Court.

[23] Third, section 4 provides no guidance whatsoever on the manner in which a search is to be conducted. One of the flaws identified by this Court in *Magajane*[16] was that the relevant section failed "to guide inspectors as to how to conduct searches within legal limits".[17] The applicants also argued that a resounding principle of South African law is that the exercise of public power must be within constitutionally permissible limits. Stipulating guidelines in legislation comports with one of the requisites of legality that laws must be clear and ascertainable.

[24] The applicants support the reasoning of the High Court regarding the finding of constitutional invalidity, the reasons why the section cannot be justified in terms of section 36, the suspension of the declaration of invalidity and, partly, the reading-in.

[25] The applicants contend that the High Court erred in finding that warrantless non-routine searches of designated premises are justifiable in all and any circumstances. This is so, they argue, because the High Court did not have regard to the fact that speed of action is not required in all circumstances and that where it is required, it is in any event facilitated by the fact that search warrants may be obtained without prior notice to the party affected by it (*ex parte*). Warrantless non-routine searches should remain the exception and, if necessary, could be catered for as provided for in section 4(4)(e)(ii).[18] Should this Court find that warrantless non-routine searches of designated premises are justifiable, the applicants argue that

[16] *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC).

[17] Id at para 88.

[18] Section 4(4)(e) is part of what was read in by the High Court.

these searches should be confined to the designated premises in question and should not include any of the licensees' other premises or offices.

[26] The Minister supports the confirmation of the declaration of invalidity of section 4(4)(a)(i), and 4(5)-(6) to the extent that the section permits entry and searches without a warrant. The Minister, however, opposes the confirmation of invalidity of section 4(4)(a)(ii) as it is a self-standing provision and only empowers inspection in terms of section 101. The Act requires a person to keep a book of account and the mere production of books does not violate the right to privacy – so long as the entrance is lawful. Entrance to the premises requires a warrant or consent but all that this section empowers the official to do is to demand compliance with section 101.

[27] The Minister further opposes confirmation of the declaration of invalidity of section 4(4)(b). On the Minister's argument, it cannot be unconstitutional for an official to require that he or she be assisted by the police where there is a reasonable suspicion that there may be resistance requiring protection.

[28] On remedy the Minister argues that the "interim order is too detailed and reads like an administrative action rather than a law". The distinction between routine and non-routine searches, so the Minister contends, is unhelpful and theoretical. The Minister, however, argues that the imperfections in the interim order are what make it acceptable as it is these imperfections which will force the Legislature to act with the necessary expedition to amend the legislation.

[29] While the SARS respondents accept that the provisions of section 4 are overbroad and unconstitutional, their approach differs – from that of the applicants – on the extent of the constitutional invalidity and the nature of the remedy to be granted.

[30] They submit that the Constitution protects only reasonable expectations of privacy and that there is no reasonable expectation of privacy in respect of business premises which are registered or licensed under the Customs and Excise Act; and those used to conduct the business of persons who are registered or licensed under that Act. This is the case because of the pervasive control and monitoring by SARS over premises registered or licensed in terms of the Act. Further, at best for the applicants, any expectation of privacy is sharply attenuated. When this is weighed against the critical need for SARS to have wide powers of entry, inspection and search in respect of customs premises,[19] the Constitution does not preclude the grant of the powers to SARS. For this reason a limitation of the right to privacy, if there be any, is also readily justifiable in terms of section 36 of the Constitution.

[31] The SARS respondents seek to distinguish this matter from what this Court found in *Magajane*[20] and to show that the applicants' reliance on it is misplaced. *Magajane*, according to the SARS respondents, did not decide the extent to which the

[19] The term is used by SARS to denote business premises which are registered or licensed under the Act and business premises used to conduct the business of persons who are registered or licensed under the Act.

[20] Above n 16.

right to privacy is infringed by a warrantless search of licensed premises as it was concerned with a search on unlicensed premises.

[32] The SARS respondents further argue that the distinction between routine and non-routine/targeted searches is not a constitutional requirement nor does it conducive to practical application. During searches officials engage in both general inspections and in further searches if anything suspicious arises. In these circumstances, if the High Court and the applicants' line of reasoning were to be followed, a routine search would have to stop dead in its tracks and a warrant would have to be obtained first before the official could continue with it.

[33] On remedy the only area of contention is the wording of the reading-in to be adopted. The SARS respondents argue that the construction of the section by the High Court is overly constraining, impractical and confusing. They attached a draft order to their written submissions – based on their interpretation of the extent of the invalidity – which they claim would constitute just and equitable relief.[21]

Discussion

[34] Flowing from the High Court's declaration of constitutional invalidity, the reading-in and the submissions made before us, the issues for determination are:

[21] The essence of the draft order is that an officer may, for purposes of the Act, and without a warrant enter premises managed by the state or a public entity, premises licensed by the Act, premises occupied by a person licensed or registered in terms of the Act and premises entered with consent of the owner. In addition the draft also allows for searches without a warrant, in those instances where a warrant would ordinarily be required, if the officer on reasonable grounds believes that a warrant would be issued by a magistrate or a judge if applied for and if the delay in obtaining a warrant is likely to defeat the purposes of entry into the premises. The draft also sets out requirements that an officer would have to comply with when conducting a search.

(a) Are sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) unconstitutional and thus invalid:

i. do they limit the right to privacy; and

ii. if they do, is the limitation justified?

(b) If the sections are unconstitutional and thus invalid, must the declaration of invalidity be retrospective?

(c) Should the declaration of invalidity be suspended pending correction of the defect?

(d) How long should the period of suspension be?

(e) If the declaration of invalidity is suspended, should there be a remedy in the interim?

Constitutionality of the impugned provisions

[35] The right to privacy extends beyond the inner sanctum of the home.[22] Even though businesses do have a right to privacy, they have a lower expectation of privacy as to the disclosure of relevant information to the authorities as well as the public.[23]

[36] In *Mistry*[24] this Court considered the right to privacy in the context of regulatory inspections.[25] Relying on *Bernstein*, it stated that regulated businesses

[22] *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 67 (*Bernstein*).

[23] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at paras 17-8.

[24] *Mistry v Interim Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC).

possess a more attenuated right to privacy, more so if the business is public, closely regulated and potentially hazardous to the public.[26]

[37] Sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the Customs and Excise Act authorise:

(a) warrantless searches "*at any time*", "*at any premises whatsoever*";

(b) the demanding of any book, document or thing from any person believed to have it in his or her possession or under his or her control "*at any time*" and "*at any place*";

(c) the breaking open of any door or window or breaking through any wall of "*any premises*" and "*at any time*";

(d) the breaking up, "*at any time*", of any ground or flooring on "*any premises*" for the purpose of a search; and

(e) the opening, in any manner, of any room, place, safe, chest, box or package (and all these refer to "*any premises*") if it is locked and the keys are not produced on demand.

[38] Clearly, "*any premises*" and "*any premises whatsoever*" include private homes. The only qualification, if a qualification at all, on the exercise of the search power is that an officer may enter any premises "*for the purposes of this Act*". The wording is so broad that it brings within its sweep not only the places of business and homes of

[25] Regulatory inspections can be described as inspections aimed at ensuring compliance with a regulatory framework set out in a statute.

[26] *Mistry* above n 24 at para 29.

people who are players in the customs and excise industry, but also the homes of their clients, associates, service providers, and employees and their relatives. Quite conceivably, the premises – business or homes – of any person who, somehow, may be linked to a player in the customs and excise industry may be the subject of a search in terms of the impugned sections. The breadth of the impugned sections in relation to premises becomes quite plain.

[39] The language of the section says nothing about the need for the searches – regardless of type – to be motivated by a suspicion, let alone a reasonable one. This is true of business premises and people's homes.

[40] The provisions are broad as to the manner of conducting the searches. Searches may be conducted in private dwellings at any time, and officials may not only break in at the dwellings but, once inside, they may even break up floors. And they do not need a warrant to do all this.

[41] That this power – unbounded as to time, scope of the search and type of premises – is extremely intrusive is manifest.

[42] In *Mistry*[27] this Court held that while a warrant requirement might be nonsensical if the statute had provided only for periodic regulatory inspection of premises, as a prior warrant could frustrate the objectives behind the search, there was

[27] *Mistry* above n 24 at para 27.

no reason not to require a warrant for searches that could extend to a private home. The Court emphasised that it would be incongruous to require police officers, who are trained to search homes, to obtain warrants, but not to require the same from inspectors who are not so trained. Also, the Court found that this violation was compounded by the fact that there was not sufficient guidance to the inspectors on the manner in which searches should be conducted. This reasoning applies with equal force to this matter.

[43] I conclude that sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) do limit the right to privacy.

[44] Coming to justification, in *Magajane* this Court said:

> "The limitation analysis in terms of section 36 involves a proportionality review. A court has to consider an applicant's expectation of privacy and the breadth of the legislation, among other considerations. The expectation of privacy will be more attenuated the more the business is public, closely regulated and potentially hazardous to the public. Legislation may not be so broad as to have the real potential to reach into private homes. In assessing whether legislation could have achieved its desired ends through less damaging means, a court will determine whether the legislation could have required a warrant, and a court will consider whether a warrant requirement would frustrate the state's regulatory objectives and whether in the absence of a warrant the legislation provides sufficient guidance to inspectors as to the limits of the inspections."[28]

[28] *Magajane* above n 16 at para 50.

[45] It is so that at issue in *Magajane* were search and seizure powers in respect of unlicensed businesses. But some of the propositions contained in the judgment are of relevance to this case.

[46] Section 36 enjoins a court to balance all relevant factors.[29] I next deal with these factors.

The nature of the right

[47] Section 14 of the Constitution refers to the right to privacy which includes the right of an individual not to have their person, home or property searched or their possessions seized or have the privacy of their communications infringed. McQuoid-Mason[30] says that "privacy has a variety of connotations, has been described as 'an amorphous and elusive' concept and has been closely identified with the concept of identity."[31] He refers to Westin who describes privacy as "the voluntary and temporary withdrawal of a person from the general society through physical and

[29] Section 36 of the Constitution reads as follows:

> "Limitation of rights
>
> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[30] "Privacy" in Woolman et al *Constitutional Law of South Africa* 2 ed vol 3 (RS 5) at 38-1.

[31] *Bernstein* above n 22 at para 65.

psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve".[32] The right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life.

[48] In *Magajane* Van der Westhuizen J pointed to the fact that in *Mistry*[33] this Court "described the essential nature of the right to privacy as protected in section 14 of the Constitution and the means through which section 14 repudiates repugnant past practices and reaffirms others consistent with the new constitutional values".[34] This is what *Mistry* tells us:

> "The existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. [The right to privacy] accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values."[35]

[32] *Privacy and Freedom* (1967) at 7. The International Commission of Jurists Conclusions of the Nordic Conference on the Right to Privacy (1967) defined privacy as "the right to be left alone to live one's own life with the minimum degree of interference".

[33] *Mistry* above n 24.

[34] *Magajane* above n 16 at para 63.

[35] *Mistry* above n 24 at para 25.

[49] Privacy, like other rights, is not absolute.[36] As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space does not mean that once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what one has strayed from the inner sanctum of the home.

Purpose of the limitation

[50] Perhaps this is best understood by looking at the nature of customs and excise duty as well as the rationale for customs and excise controls.

[51] Customs duty can be described as a "tax levied on imports . . . by the customs authorities of a country to raise state revenue, and/or to protect domestic industries from more efficient or predatory competitors from abroad".[37]

[52] Excise duty[38] is an inland tax on the sale, or production for sale, of specific goods or a tax on specified goods produced for sale, or sold, within a country or licenses for specific activities.[39]

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[36] *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 106.

[37] Definition found at the online version of the Business Dictionary to be found at www.businessdictionary.com.

[38] It may perhaps be illuminating to state that there is also an excise levy. It is a levy imposed by a country because of the impact the production of a certain product has on it. For example, South Africa currently

[53] Customs duty is levied, primarily, to:

(a) raise revenue;

(b) regulate imports of foreign goods into South Africa;

(c) conserve foreign exchange, regulate the supply of goods into the domestic market; and

(d) provide protection to domestic industries from foreign competition.

[54] Excise duties and levies are imposed mostly on high-volume daily consumable products (for example, petroleum, alcohol and tobacco products) as well as certain non-essential or luxury items (for example, electronic equipment and cosmetics). The primary function of these duties and levies is to ensure a constant stream of revenue for the state, with a secondary function of discouraging consumption of certain products that are harmful to health or the environment. The revenue generated from these duties and levies amounts to approximately ten per cent of the total revenue received by SARS.[40]

[55] This means customs and excise controls serve an important public purpose. The Act is essentially a fiscal piece of legislation. The tight regulation of customs and excise is calculated to reduce practices that are deleterious to the purpose of the customs and excise regime. The impugned provisions ensure effective monitoring and

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imposes a levy on petroleum products and an environmental levy on certain products and activities, such as certain plastic carriers and flat bags; generation of electricity from certain sources; and electric filament lamps.

[39] Definition found at the online version of the Business Dictionary to be found at www.businessdictionary.com.

[40] SARS *Guide to Excise Duties and Levies* 20 February 2013, found at www.sars.gov.za.

prevent – as far as possible – evasion of payment of what is due in terms of the Customs and Excise Act. SARS tells us that despite the industry regulation that is in place, the country still loses billions of rand. Thus there is a need for regular inspections. This is especially so in our country, which is a developmental state that can ill-afford loss of revenue – in such large sums, to boot – through evasion.

[56] Adapting this to the present matter, as shown by the extent of the loss of revenue, evasion is so pervasive as to necessitate tight control. That is possible through regular inspections. Besides the revenue component, inspections are equally important for the other purposes of customs and excise control. The importance and incontestable necessity of control and constant monitoring diminish the invasiveness of searches under the impugned sections. And individuals involved in the customs business are well-aware that monitoring and inspection are an integral part of the industry.

The nature and extent of the limitation

[57] In *Magajane* this Court said that

> "[i]n the context of a regulatory inspection of commercial private property, there are at least three issues that will have a bearing on the nature and extent of the limitations, namely (1) the level of the reasonable expectation of privacy, (2) the degree to which the statutory provision resembles criminal law and (3) the breadth of the provision".[41]

[41] *Magajane* above n 16 at para 66.

I discuss each of these in turn.

[58] The more public the undertaking and the more closely regulated the industry, the more attenuated the right to privacy and the less intense any possible invasion.[42] As a person's privacy interest is more attenuated and as the individual has a lessened reasonable expectation of privacy, the scope of that individual's personal space shrinks and the individual's right to privacy may be diminished further by the rights accruing to other citizens.[43]

[59] The degree of privacy that can reasonably be expected by a person may vary significantly depending on the commercial activity that brings one into contact with the state.[44]

[60] In a modern society, it is generally accepted that many commercial activities in which individuals may engage must, to a greater or lesser extent and depending on their nature, be regulated by the state to ensure that the individual's pursuit is compatible with the community's interest in the realisation of collective goals and aspirations.[45] How tight the control must be will depend on the nature of the industry. In many instances, the regulation must necessarily involve the inspection of private commercial premises by agents of the state. Obvious means of testing compliance

[42] *Mistry* above n 24 at para 27.

[43] *Bernstein* above n 22.

[44] *Mistry* above n 24 at para 27 fn 43 and the authorities cited therein.

[45] *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 at 505-7.

with statutory regulation are random inspections by state functionaries. The reasonableness of a person's expectation of privacy, and thus the strength of that person's privacy interest, can vary depending on the regulatory scheme to which that person is subject.

[61] According to *Magajane*:

> "*Mistry* listed a number of respects in which the proprietor of a business generally has a reduced expectation of privacy. Reasonable regulations and inspections are an 'inseparable part of an effective regime of regulation.' The more a business creates potential hazards to the public, the more important and less invasive the inspection. People involved in certain businesses must be taken to know that their activities will be monitored."[46] (Footnote omitted.)

[62] In these circumstances, an expectation of a wholesome right to privacy by an industry participant would be unreasonable: the right is simply attenuated, and greatly so.

[63] The customs and excise industry is closely controlled and regulated. Given that fact, participants in the customs and excise industry must be taken to expect regular inspections.[47] Consequently, the right to privacy in respect of business premises in this context is greatly attenuated. On the other hand, in respect of private homes the right remains as strong as one can imagine.

[46] *Magajane* above n 16 at para 68.

[47] Compare *Magajane* above n 16 at para 50.

[64] But the Customs and Excise Act does not discriminate between the types of premises that may be subjected to searches for the purposes specified in the statute. Needless to say, in respect of private dwellings, participants in the customs and excise industry are still entitled to expect – and reasonably so – that the law will respect and protect their right to privacy.

[65] Provisions that more closely resemble traditional criminal law require closer scrutiny. The distinction will often be between compliance and enforcement.[48] Inspections aimed at compliance[49] are unlike criminal searches and are likely to limit the right to privacy to a lesser extent. Searches aimed at enforcement[50] are akin to criminal searches, especially if there are penal sanctions under the regulatory provision or if the target may be charged criminally.[51] Enforcement searches of this nature – as was the case here – are generally more invasive and involve a greater limitation of the right to privacy.[52]

[48] *Magajane* above n 16 at para 70.

[49] The supervision of an industry at large, without particular regard to any pre-existing objective except to ensure the integrity of the scheme of regulation in general.

[50] A focused investigation under a regulatory scheme, often with a view to penal or quasi-penal consequences.

[51] Breaches of the Act can lead to the imposition of administrative penalties (for example, section 91 of the Act which provides that where a person has contravened the provisions of the Act, agrees to abide the decision of the Commissioner, the Commissioner may, after such enquiry as he deems necessary, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount deposited or secured) or even the instigation of criminal investigation and the imposition of a sanction (for example, section 78(1) of the Customs and Excise Act, provides that any person who contravenes any of its provisions will be guilty of an offence).

[52] *Magajane* above n 16 at para 70.

[66] The breadth of the impugned provisions is crucial to the question of the extent of the limitation.[53] As demonstrated above, the provisions are overbroad. The provision allows searches that are not only warrantless, there is no limit as to (a) the time when searches may be conducted, (b) the types of premises that may be searched, and (c) the scope of the search. Instead, SARS officials are given far-reaching powers (breaking in and breaking floors) that may be exercised anywhere, at whatever time and in relation to whomsoever, with no need for the existence of a reasonable suspicion, irrespective of the type of search.

The relation between the limitation and its purpose

[67] There must be a rational connection between the purpose of the law and the limitation imposed by it.[54] In broad terms, that rational connection does exist between the limitation at issue here and the provision's purpose. The tight regulation of the customs and excise industry is enforced through inspections. Intrinsically, inspections of this kind are still intrusive, although they must be somewhat tolerable in respect of business premises. But this is something that participants in the industry must be content with if compliance with the Customs and Excise Act is to be achieved. It is in this context that the limitation of the right to privacy must be understood.

Less restrictive means to achieve the purpose

[68] It is difficult to see how the achievement of the basic purposes of the Customs and Excise Act requires that inspectors be allowed to enter private homes and inspect

[53] *Mistry* above n 24 at para 28.

[54] *Magajane* above n 16 at paras 72-3.

documents and possessions at will. The fact that the Customs and Excise Act is manifestly in the public interest in no way diminishes the need to protect and uphold the privacy and, indeed, dignity of individuals where – as in the case of private dwellings – these rights are by no means attenuated.

[69] Exceptions to the warrant requirement should not become the rule.[55] A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions.[56] A warrant guarantees that the state must be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search.[57] Our history provides evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation.

[70] The law recognises that there will be limited circumstances in which the need for the state to protect the public interest compels an exception to the warrant

[55] Id at para 74.

[56] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 78.

[57] *Hyundai* above n 23 at para 40.

requirement.[58] Also, as indicated above, in certain instances, regulatory inspections aimed at advancing the general welfare of the public require just such an exception.[59]

[71] When legislation authorises warrantless regulatory inspections, provision must be made for a constitutionally adequate substitute to ensure certainty in the conduct of the inspections and limit the discretion of the inspectors.[60] In *Dawood*[61] this Court stated:

> "We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a

[58] Section 22 of the Criminal Procedure Act provides:

> "A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—
>
> (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
>
> (b) if he on reasonable grounds believes—
>
> (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
>
> (ii) that the delay in obtaining such warrant would defeat the object of the search."

[59] *Magajane* above n 16 at para 75.

[60] Id at para 77.

[61] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*).

> legislative requirement that delegated legislation be properly enacted by a competent authority."[62] (Footnote omitted.)

[72] The legislation must sufficiently inform the property owner that searches of the property will be undertaken periodically and for a specific regulatory purpose. The discretion of the inspectors should be limited as to time, place and scope.[63] To my mind, the legislation must also provide for a manner of conducting searches that accords with common decency and is not more intrusive than is necessary.

[73] In conclusion under this head, less restrictive means to achieve the purpose of the Act do exist. For example, there is no cogent reason for not providing for warrants in respect of searches of people's homes,[64] with exceptions similar to those provided for in section 22 of the Criminal Procedure Act. There is no readily discernible reason – in conducting searches – for not having bounds as to time, place and scope.

[74] A balancing of all these factors leads me to the conclusion that the impugned sections cannot be justified in terms of section 36.

[75] The distinction the applicants urged us to make regarding routine and non-routine searches, on the one hand, and types of premises,[65] on the other, seems to be problematic for this Court to make in these proceedings. A distinction between the

[62] Id at para 54.

[63] *Magajane* above n 16 at para 77.

[64] *Mistry* above n 24 at para 29.

[65] The debate did not relate to private homes. It concerned designated, licensed and business premises.

types of searches or the types of premises to be searched does not need to be made in this judgment. I am particularly loath to do so as the lawmaker is – at this very moment – in the process of crafting a legislative measure that aims to address the unconstitutionality. The Legislature, guided by this judgment to the extent certain pronouncements have been made, should be given latitude to formulate the inner and outer reaches of the search power.

Must the declaration of invalidity be retrospective?

[76] It is clear that an order of full retrospective effect would render unlawful all searches under section 4(4) from when the Constitution came into force. In the present circumstances, this approach would be inconsistent with our jurisprudence. In *Bhulwana*[66] this Court held that as a "general principle . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity."[67]

Must the declaration of invalidity be suspended?

[77] In deciding whether to suspend the declaration of invalidity, a Court "must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna."[68]

[66] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC).

[67] Id at para 32.

[68] *J and Another v Director General, Department of Home Affairs, and Others* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) at para 21.

[78] The declaration of invalidity should be suspended as, without the suspension, SARS will not be able to conduct even regulatory searches and a lacuna will be created. A suspension coupled with an interim reading-in will afford Parliament an opportunity to craft an appropriate legislative solution to remedy the constitutional defect, while – in the interim – ensuring that SARS can properly carry out its duties in terms of the Customs and Excise Act. Leaving SARS without the necessary power to ensure compliance with the Act would simply not be in the public interest. As indicated above, this is an industry that requires tight regulation. Thus it is important for SARS to be able to continue monitoring compliance with the regulatory framework. The search provisions in the Criminal Procedure Act and National Prosecuting Authority Act are unsuited to the monitoring and regulating functions of SARS. Searches in terms of these two statutes are in the context of enforcement.

[79] To the extent that some searches may go beyond mere monitoring and regulating, a short period of suspension may well be necessary so that the unacceptable elements of the impugned sections endure for as short a period as possible.

[80] The continuing unconstitutionality will be ameliorated by the tightly framed reading-in dealt with below.

How long should the period of suspension be?

[81] The High Court suspended the order of invalidity for a period of 18 months to allow the Legislature time to correct the defect. Before us the picture has changed significantly. We have been informed by SARS that on 4 July 2013, the National Treasury published the draft Taxation Administration Laws Amendment Bill, 2013 for public comment. That draft Bill seeks to remedy the constitutional deficiencies in section 4(4) to (6) of the Customs and Excise Act. SARS states that on the basis of past experience it is anticipated that the draft Bill will likely be enacted into law by either late January or early February 2014.[69] Based on this, and the assurance by counsel for SARS that this could be done within a relatively short period, I see no reason to order a period of suspension of the declaration of invalidity which exceeds six months.

Interim remedy

[82] One possible remedy is reading-in. Reading-in has been the object of some suspicion and courts must resort to it sparingly. The actual act of writing or editing legislation may constitute a possible encroachment by the judiciary on the terrain of the Legislature and, therefore, a violation of the separation of powers.[70]

[69] Public hearings on the Bill were conducted on 20 and 21 August 2013 and at the time of the writing of this judgment the Standing Committee on Finance had indicated that they hoped to refer the Bill to the National Assembly by early October.

[70] Bishop "Remedies" in Woolman et al *Constitutional Law of South Africa* 2 ed vol 1 (RS 5) at 9-104 to 9-105.

[83] In *Johncom Media Investments Limited*[71] Jafta J held that a temporary reading-in is permissible and is just and equitable. In *C*[72] the Court stated:

> "[T]he only feasible way forward is reading-in. This course will not unduly intrude into the domain of Parliament because Parliament can amend the statute at any time."[73]

[84] Depending on its nature and extent, the remedy thus does not intrude unduly into the lawmaker's sphere. With interim reading-in, there is recognition of the Legislature's ultimate responsibility for amending Acts of Parliament: reading-in is temporary precisely because the Court recognises that there may be other legislative solutions. And those are best left to Parliament to contend with.

[85] Thus during the period of suspension, there is a need for a reading-in. When SARS officials wish to search homes (private residences) pursuant to the powers conferred by section 4, they must apply for a warrant in terms similar to those required by section 22 of the Criminal Procedure Act[74] or section 29 of the National

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[71] *Johncom Media Investments Limited v M and Others* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) at para 40.

[72] *C and Others v Department of Health and Social Development, Gauteng and Others* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) (*C*).

[73] Id at para 89.

[74] Section 21(1) of the Criminal Procedure Act provides:

> "Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—
>
> (a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
>
> (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or

Prosecuting Authority Act:[75] the exception provided for in those pieces of legislation (a need to act swiftly coupled with a belief – on reasonable grounds – that a warrant would otherwise have been authorised) also to be applicable to this reading-in.

[86] Privacy is most often seen as a fundamental personality right deserving of protection as part of human dignity.[76] This Court in *Mistry*[77] held that, to the extent

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under the control of any person or upon or at any premises is required in evidence of such proceedings."

Section 22 of the same Act provides:

"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes—

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

[75] Section 29 of the National Prosecuting Authority Act in relevant part provides:

"(4) Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

. . .

(10) (a) The Investigating Director or any person referred to in section 7(4)(a) may without a warrant enter upon any premises and perform the acts referred to in subsection (1)—

(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that—

(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal."

that a statute authorises warrantless entry into private homes and the rifling through private possessions, the statute breaches the right to privacy. To this end, it is necessary that the right to privacy with regard to the homes of individuals and their private possessions is protected. In this context the expectation of privacy is higher and, at the very least, entry and searches conducted there have to be authorised by warrants. This is in line with *Magajane*.[78] The reading-in of this requirement is warranted.

Costs

[87] These are proceedings which, in terms of section 167(5), had to be brought to this Court for confirmation. The applicants were successful in their challenge in the High Court, where they were awarded costs. It is the norm to award costs in favour of a successful applicant for confirmation.[79] I see no reason why that should not be the case in this matter.

Order

[88] The following order is made:

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[76] See Burchell *Personality Rights and Freedom of Expression: The Modern* Actio Injuriarum (Juta and Co Ltd, Cape Town 1998) and Markesinis et al "Concerns and Ideas About the Developing English Law of Privacy (and How Knowledge of Foreign Law Might Be of Help)" (2004) 52 *American Journal of Comparative Law* 133 at 153.

[77] *Mistry* above n 24.

[78] *Magajane* above n 16.

[79] See *Mvumvu and Others v Minister for Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC); *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC); and *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC).

1. The declaration of constitutional invalidity of sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the Customs and Excise Act 91 of 1964 made by the Western Cape High Court, Cape Town is confirmed.

2. The declaration of invalidity is not retrospective.

3. The order is suspended for six months to afford the Legislature an opportunity to cure the invalidity.

4. During the period of suspension, section 4(4) of the Customs and Excise Act will be deemed to read as follows, what is underlined being the reading-in:

> "(4) (a) An officer may, for the purposes of this Act—
>
> (i) without previous notice, at any time enter any premises, <u>except a private residence</u>, and make such examination and enquiry as he deems necessary;
>
> (ii) while he is on the premises or at any other time require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by this Act is required to be kept or exhibited or which relates to or which he has reasonable cause to suspect of relating to matters dealt with in this Act and which is or has been on the premises or in the possession or custody or under the control of any such person or his employee;
>
> (iii) at any time and at any place require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in this Act, the production thereof then and there, or at a time and place fixed by the officer; and
>
> (iv) examine and make extracts from and copies of any such book or document and may require from any

person an explanation of any entry therein and may attach any such book, document or thing as in his opinion may afford evidence of any matter dealt with in this Act.

(b) An officer may take with him on to any premises an assistant or a member of the police force.

(c) Premises that are a private residence may be entered by an officer in terms of paragraph (a) only on the authority of a warrant issued by a magistrate or judge.

(d) A magistrate or judge may issue a warrant referred to in paragraph (c) only on written application by an officer setting out under oath or affirmation the grounds why it is necessary for an officer to gain access to the relevant premises.

(e) The magistrate or judge may issue the warrant referred to in paragraph (c) if it appears from information on oath or affirmation that—

(i) there are reasonable grounds for suspecting that a contravention of the Act has occurred;

(ii) a search of the premises is likely to yield information pertaining to such contravention; and

(iii) the search is reasonably necessary for the purposes of the Act.

(f) An officer may enter and search a private residence without the warrant referred to in paragraph (c) if—

(i) the officer on reasonable grounds believes—

(aa) that a warrant would be issued in terms of paragraph (c) if the officer applied for it; and

(bb) that the delay in obtaining the warrant is likely to defeat the object of the search."

5. The respondents are ordered, jointly and severally, to pay the applicants' costs, including costs of two counsel.

For the Applicants:	Advocate A Katz SC, Advocate M Ioannou instructed by Maurice Phillips Wisenberg Attorneys.
For the First Respondent:	Advocate P Mtshaulana SC instructed by the State Attorney.
For the Second and Third Respondents:	Advocate S Budlender, Advocate J Berger instructed by the State Attorney.